U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 April 2005

Case No.: 2004-LHC-1276

OWCP No.: 5-114800

In the Matter of:

JESSE JOHNSON,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer.

DECISION AND ORDER

This proceeding arises from a claim filed by Jessie C. Johnson (Claimant) against Newport News Shipbuilding & Dry Dock Company (Employer) under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et. seq. (hereinafter the Act).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Newport News, Virginia on December 8, 2004. All Parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit (JX) 1
2. Claimant's Exhibit (CX) 1 – 5[1]
3. Employer's Exhibit (EX) 1 – 7.

Based on the following stipulations of the Parties, the evidence introduced and the arguments presented, I find as follows:

I. Stipulations

1. That an employer/employee relationship existed at all relevant times;

[1] Upon completion of the hearing I ordered the record held upon for ten days for Claimant's submission of post-hearing evidence. Claimant submitted a completed LS-208 form with attachment. (CX 5). This is admitted as evidence and labeled as noted.

2. That the Parties are subject the jurisdiction of the Act;

3. That Claimant alleges an injury to his right foot with a date of diagnosis 8-12-2002;

4. That a timely notice of injury was given by the employee to Employer;

5. That a timely claim for compensation was filed by the employee;

6. That Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. That Claimant's average weekly wage at the time of this injury was $644.12 resulting in a compensation rate of $429.31.

II. Issue

Whether Claimant is entitled to disability benefits from February 10, 2003 and continuing?[2]

III. Statement of the Case

A. Claimant's Testimony

Claimant is a fifty-eight year old male who worked for Employer from 1967 until 2002. (Tr. 11). While working for Employer, Claimant was employed as either a shipfitter or maintenance personnel. On August 12, 2002, Claimant injured his right foot. (Tr. 14). At the time of his injury, Claimant was working maintenance, which includes such duties as testing high-pressure and low-pressure hoses. This position requires the employee to wear steel-toed shoes. (Tr. 13).

Claimant was diagnosed with diabetes fourteen years ago. (Tr. 13). On August 12, 2002, Claimant developed a blister on his right foot. Prior to this injury, Claimant had no other problems similar to this injury. Claimant reported the injury to the doctor and was taken out of work until October, 2002. By the time Claimant returned to work the blister had healed.

After working for four days, the same spot on Claimant's toe became sore. (Tr. 15-16). Claimant returned to the doctor and was taken out of work again. He was later released but was unable to return to work in the shipyard because he could no longer wear steel-toed boots. (Tr. 17-18). On cross-examination, Claimant affirmed that the last time he wore steel-toed boots was February 3, 2003. (Tr. 20). Claimant also affirmed that he has not looked for employment since that time. (Tr. 21).

[2] Claimant and Employer agree that Claimant was entitled to benefits from the date of his injury until February 9, 2003 and was properly paid. (CX 5).

On cross-examination, Claimant confirmed that he is trained to work with nuclear reactors. (Tr. 23). To become trained in this capacity, Claimant passed Employer's training program. Claimant also affirmed that he is able to drive and in his position with Employer he had to read in order to complete his job.

B. Testimony of William Kay and Labor Market Survey

Kay is an expert in the field of vocational rehabilitation. (Tr. 26). Kay is employed with GENEX Services, Incorporation and his office is located in Employer's shipyard. (Tr. 27). Kay performed a labor market survey on Claimant at the request of Employer. To conduct this survey, Kay first obtained Claimant's medical records and personnel records from Employer. According to Claimant's medical records, Kay found there were medical restrictions that needed to be applied. In 1993, Dr. Nevins imposed permanent work restrictions of no climbing vertical ladders and no kneeling or squatting for prolonged periods of time. On November 13, 2002, Dr. Splan imposed the work restriction of no steel-toed boots. (Tr. 29; EX 6). Kay also analyzed Claimant's educational background as well as the skills he may have from prior employment.

Based on this review, Kay identified possible career alternatives for Claimant, which were all open when he contacted them. The survey found nine different potential employers, each of which were contacted by Kay in February, 2003 specifically in regards to the survey for Claimant. (Tr. 33; EX 6). These employers were placed in three different categories, either customer service, driving or unarmed security. In customer service, Kay identified a position with Colonial Williamsburg as a night turndown. (EX 6 at 9). This position is similar to housekeeping, where the employee straightens the hotel room for the guests. (Tr. 34). This position's salary is $8.38 an hour.

Also in the category of customer service, Kay listed a position of toll collector with the City of Chesapeake. (EX 6 at 9). This position only requires the person to sit or stand for a period of time and collect the toll money. (Tr. 34). A toll collector is paid $8.50 an hour. Kay also found Claimant suitable for the position as a donation center attendant with Goodwill Industries. (EX 6 at 9). This job requires the employee to accept donations and issue a receipt in return. Kay testified that while lifting is not required, employees typically help customers carry heavier items. Kay also described the position as only requiring a courteous and dependable person. (Tr. 36). This position pays $5.15 an hour.

Under the category of unarmed security, Kay identified a position with Security Service of America. The duties of this position include monitoring hallways in motels for tour groups. (Tr. 38). This position pays $6.00 an hour. Also listed by Kay is a position with Top Guard Security. This employer has numerous positions for unarmed security guards, some with very little physical activity others with more heavy-duty lifting. (Tr. 39). These guards are paid $6.00 an hour. The last security guard position Kay identified in the survey was with Atlantic Protective Services. (EX 6 at 10). The duties of this position include inspecting vehicles and controlling traffic. (EX 6 at 17). This position also paid $5.15 an hour.

Kay listed three employers under the category of driving. First, Kay described a school bus driver position with Newport News Schools and a substitute bus driver with Suffolk City

Schools. The duties of these positions require the employee to work five to six hour days. (Tr. 40). Also, while the positions do require a commercial driver's license, the employers are willing to train their employees. The pay for the position is $9.19 an hour with Newport News Schools and $39.00 per day with Suffolk City Schools. Lastly, Kay found a driver position with MiniBus Co. This position entails driving handicapped people to medical appointments. The position does require a commercial driver's license, but the employer will train the employee. (Tr. 41). This position pays $5.15 an hour.

Based on this survey, Kay found Claimant to have a potential wage of $9.19 an hour and an average wage of $7.00 an hour. (EX 6 at 11). Furthermore, Kay stated many of these employers have salary increases over time.

C. Medical Records of Dr. Thomas Splan

Dr. Splan is Claimant's treating physician. On August 13, 2002, Dr. Splan met with Claimant to treat a blister on his right great toe. (EX 4a). In order to treat the blister, Dr. Splan excused Claimant from work until the blister healed. Dr. Splan continued to see Claimant periodically to treat the blister. (EX 4b). On June 17, 2003, Dr. Splan found that after a combination of local wound control and antibiotics, Claimant completely recovered from the injury. (EX 4c).

D. Medical Records of Dr. Nelson Keller

Claimant was referred to Dr. Keller for treatment on the blister and ulceration on his right great toe. (Tr. 20). Dr. Keller met with Claimant periodically from August, 2002 until February, 2003 applying treatment in the form of antibiotics and bandaging. (CX 3). Dr. Keller recommended Claimant not return to work until his blisters had healed. He also applied the work restriction of no steel-toed boots. (EX 5a). On February 12, 2003, Dr. Keller noted that Claimant no longer has any open wounds on his extremities. (CX 3kk).

On February 14, 2003, Dr. Keller stated that Claimant has reached maximum medical improvement (MMI) and his blisters had completely healed. (EX 7c). Furthermore, he imposed the restriction of not wearing steel-toed shoes in order to prevent Claimant from developing future ulcerations or blisters on his feet. (EX 7c). Dr. Keller also noted that Claimant informed him that he had no intention of returning to work. (EX 7c). On August 17, 2004, Dr. Keller again affirmed that Claimant was completely healed of his ulcer and blisters as of February, 2003. (EX 7a). Additionally, he noted that with the appropriate footwear, Claimant should be able to become gainfully employed. (EX 7b).

IV. Discussion

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chicago Grain Trimeers Ass'n, Inc., 390 U.S. 459, 467 reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333

(1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) aff'g 990 F.2d 730 (3d Cir. 1993).

Causation

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated that condition. See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 614-15 (1982); Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140, 144 (1991); Gencarelle v. General Dynamics Corp., 22 BRBS 170, 174 (1989), aff'd, 892 F.2d 173 (2d Cir. 1989). Claimant's creditable subjective complainants of symptoms and pain can be sufficient to establish the elements of physical harm. Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Indus., 455 U.S. at 615.

Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. Merrill, 25 BRBS at 144. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935).

In this case, I find Claimant has invoked the Section 20(a) presumption. Claimant has established that he suffered a harm, specifically the development of ulcers and blisters on his right foot. The medical records of Dr. Splan and Dr. Keller confirm Claimant's testimony that he had blisters from August, 2002 until February, 2003. (CX 2; EX 5). Claimant has also established that his position with Employer required that he wear steel-toed shoes. (Tr. 13). The medical records of Dr. Keller and Dr. Splan each state that wearing these shoes at work caused Claimant to develop the blisters on his foot. (EX 4c; EX 5b). Therefore, Claimant has established that working conditions existed which could have caused his harm.

The burden shifts to Employer to produce substantial evidence to the contrary. Employer has introduced no evidence that Claimant did not suffer a harm. Employer does not contest the evidence demonstrating that Claimant had blisters on his foot or the evidence establishing that the blisters were caused by Claimant wearing steel-toed shoes. Employer instead focuses on the underlying cause of Claimant's harm in arguing that his employment did not cause his condition.[3]

[3] Employer argues Claimant's diabetes and peripheral neuropathy are not caused by his employment. Claimant does not contest this, nor does this Court find Claimant's diabetes was caused by his employment with Employer.

Thus, I find that Claimant has invoked the Section 20(a) presumption because he has established that he suffered a harm and that working conditions existed which could have caused his harm. Employer has not rebutted the presumption with substantial evidence to the contrary.

Nature and Extent

Having established a work-related injury, the burden rests with Claimant to prove the nature and extent of his disability, if any, from those injuries. See Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching MMI. James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

On February 14, 2003, Dr. Keller opined that Claimant had reached MMI because all of Claimant's blisters and ulcers had healed. (EX 7c). This is further supported by the medical records of Claimant's treating physician, Dr. Splan. His records also state that Claimant has completely recovered from the blisters on his right foot and he has no significant disability related to that injury. (EX 4c). Claimant offers no contrary evidence to demonstrate that MMI was not reached in February, 2003. Accordingly, I find the record shows Claimant reached MMI on February 14, 2003.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of an injury, to earn wages, which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A claimant who is unable to return to his former employment **due to his work-related injury** establishes a prima facie case of total disability. Elliot v. C & P Tel. Co., 16 BRBS 89, 92 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988). The burden then shifts to the employer to show the existence of suitable alternative employment. Trans-State Dredging v. Benefits Review Bd., 731 F.2d 199, 200 (4th Cir. 1984); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on

which the employer demonstrates the availability of suitable alternative employment. Rinaldi, 25 BRBS 128. If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. Southern v. Farmer's Export Co., 17 BRBS 24 (1985).

In the present case, Dr. Keller allowed Claimant to return to work with the restriction of "no wearing steel-toed shoes." (EX 7c). Claimant asserts that with this restriction he was unable to return to his position because Employer requires its employees to wear steel-toed shoes. This restriction applies not only to Claimant's injured right foot but to his uninjured left foot as well. Dr. Keller also made clear that this restriction was imposed because of Claimant's diabetes and peripheral neuropathy, which is in no way related to his employment with Employer. (EX 7a). Claimant's treating physician, Dr. Splan, also made clear that Claimant has completely recovered from his work-related injury. (EX 4c). Drs. Keller and Splan agree that Claimant should not wear steel-toed shoes in the future because of the danger of additional break down caused by his diabetes and peripheral neuropathy. Consequently, the record clearly indicates Claimant has not demonstrated that he is unable to return to his former employment **due to his work-related injury**. Since Claimant has failed to demonstrate a prima facie case of total disability, the burden does not shift to Employer.

Even if Claimant had demonstrated a prima facie case of total disability, Employer asserts that it has met its burden of showing suitable alternative employment. To meet its burden an employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in his geographic area. Royce v. Erich Constr. Co., 17 BRBS 157 (1985); see also Williams v. Halter Marine Serv., 19 BRBS 248 (1987). For job opportunities to be realistic, the employer must establish the precise nature and terms of each job and pay for the alternative jobs. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024 (1978). The employer must produce evidence of realistically available job opportunities within the claimant's local community which he is capable of performing considering his age, education, work experience and physical restrictions. Trans-State Dredging v. BRB, 731 F.2d 199 (4th Cir. 1984).

The United States Court of Appeals for the Fourth Circuit has held that an employer meets its burden by "demonstrating the availability of specific jobs in a local market and by relying on standard occupational descriptions to fill out the qualifications for performing such jobs." Universal Maritime Corp. v. Moore, 126 F.3d 256, 265 (4th Cir. 1997). When referencing a labor market through a labor market survey to establish a suitable alternative employment, an employer must "present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform." Lentz v. Cottman Co., 852 F.2d 129, 131 (4th Cir. 1988). If a vocational expert is only able to identify one employment position, "it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." Id. The purpose of the survey is to determine whether suitable work is available for which the claimant could realistically compete. Tann, 841 F.2d at 543. The employer may meet this burden of showing suitable available employment by "presenting evidence of jobs which, although no longer open, were available during the time the claimant was able to work." Id.

To demonstrate suitable alternative employment, Employer offered the testimony and labor market survey of William Kay. The survey was completed on February 10, 2003. Based on his review of Claimant's medical records and personnel records from Employer, Mr. Kay was able to identify several positions. The descriptions in the survey and Mr. Kay's testimony illustrate that these positions are within Claimant's work restrictions. The positions were all available as of February 10, 2003 and each paid anywhere between minimum wage and $9.19 per hour. (EX 6).

The labor market survey identified several positions that were categorized as customer service. Mr. Kay listed a position as a night turndown with Colonial Williamsburg. (EX 6 at 9). This position is described as similar to housekeeping, where the employee straightens the hotel room for guests. (Tr. 34). The position does not require specific footwear and pays $8.38 an hour. Also in the category of customer service, Mr. Kay listed a position as toll collector, which pays $8.50 an hour. (EX 6 at 9). The duties of this position require the employee to either sit or stand and collect money for a toll. (Tr. 34). The last position mentioned under the category of customer service is a donation center attendant. (EX 6 at 9). This job requires the employee to accept donations and issue receipts. There are no physical requirements and the position pays $5.15 an hour. I find each of the customer service positions to be suitable alternative employment.

The survey also listed positions under the category of unarmed security. (EX 6 at 9-10). These positions require their employees to complete such tasks as monitoring hallways, inspecting vehicles and controlling traffic. None of the employers identified by Mr. Kay require any specific footwear. The pay for unarmed security ranges from $5.15 an hour to $6.00 an hour. I also find each of these positions to be suitable alternative employment.

Lastly, the survey listed three employers under the category of driving. Included in this category are two bus driver positions, which require the employee to work between five and six hours a day. (Tr. 40). While these employers do require the drivers to have a commercial driver's license, the employers are willing to train their employees. The pay for these positions ranges from $9.19 an hour to $39.00 a day. Mr. Kay also identified a position requiring the employee to drive handicapped people to their medical appointments. This position requires a commercial driver's license; however, this employer will also train the employee. (Tr. 41). The pay for this position was listed as $5.15 an hour. With the employers' ability to accommodate Claimant, all driving positions are suitable alternative employment.

The survey demonstrates that a range of jobs existed in the Hampton Roads area, which were reasonably available, and which Claimant could have realistically secured and performed. See Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The conclusions drawn by Mr. Kay in the survey are creditable, as he has demonstrated that he was aware of Claimant's age, education, work experience and physical limitations when he explored the local opportunities. See Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985). Therefore, I find that in the alternative, suitable alternative employment existed as of February 10, 2003. Averaging the compensation rates for the suitable positions identified, I find that Claimant has an earning capacity of $7.00 per hour.

Claimant may nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043. In this case, Claimant has failed to demonstrate that he performed a diligent job search. Claimant specifically testified that he has not looked for employment. (Tr. 21). Moreover, Dr. Keller's notes indicate Claimant had no intention of returning to work. (EX 7c).

Conclusion

Therefore, I find Claimant has failed to establish his entitlement to additional compensation. Claimant has not demonstrated a permanent work-related injury. However, even if his permanent condition was related to his employment, Employer has presented evidence of other suitable alternative employment which existed at the time Claimant reached maximum medical improvement. Furthermore, after maximum medical improvement Claimant has a 0% impairment rating on which to base any scheduled award.

ORDER

1. Claimant was paid compensation at the appropriate rate prior to February 10, 2003.

2. Claimant's request for further benefits is hereby DENIED.

A

LARRY PRICE
Administrative Law Judge

LWP/LPR
Newport News, Virginia